

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re)	Case No. 97-03746
)	Chapter 11
UPLAND PARTNERS,)	
)	Re: Docket Nos. 2436, 2475, 2492
Debtor.)	2705, 2755
_____)	

**SUPPLEMENTAL MEMORANDUM REGARDING THE
SECOND APPLICATION FOR INTERIM COMPENSATION
BY TRUSTEE'S COUNSEL**

By order entered on February 13, 2004, the court asked the parties to comment on whether the Trustee's Second Interim Application For Allowance And Award Of Professional Fees And Reimbursable Expenses ("Second Fee Application") filed April 23, 2003, requested duplicate fees or expenses that were previously awarded in the Order Approving And Authorizing Payment Of Fees And Expenses To Trustee And His Counsel ("First Fee Order") entered February 11, 2003. Lyle Hosoda, Esq., Trustee's counsel, filed a memorandum in response on February 23, 2004. No opposition or reply was filed.

Background

First Fee Order. The Trustee's counsel, Lyle S. Hosoda & Associates, LLC, filed its first application for interim compensation in the amount

of \$93,374.40 and reimbursement of expenses in the amount of \$7,881.70 for the period from March 12 to August 15, 2002. Certain parties in interest objected to the request, arguing (among other things) that all of the money in the estate was subject to liens claimed by Kula Olinda Associates (“KOA”) alleged liens and that therefore the estate could not pay any administrative expenses at that time. The Trustee’s counsel argued that his fees and expenses could be surcharged against KOA’s alleged collateral under 11 U.S.C. § 506(c).

After additional briefing by the parties, and an evidentiary hearing, this court issued the First Fee Order. That order was supported by the Findings of Fact And Conclusion Of Law Regarding Payment Of Fees And Expenses To Trustee And His Counsel Under 11 U.S.C. §506(c) entered on that same date. The First Fee Order allowed interim compensation of \$93,374.40 and expenses of \$7,881.71 for the Trustee’s counsel and authorized payment of \$74,431.82 in compensation and \$7,881.71 in expenses pursuant to section 506(c). Thus, although all of the requested fees and expenses were allowed, there remained \$18,942.58 in fees that could not be paid because these amounts could not be surcharged against the collateral under section 506(c).

Second Fee Order. The Trustee’s counsel filed its Second Fee Application for interim compensation and reimbursement of expenses for the

period from August 15 to December 31, 2002. The Second Fee Application sought allowance and payment of fees of \$96,046.26 and expenses of \$6,875.53. The Order Granting The Trustee's Second Interim Application For Allowance And Award Of Professional Fees And Reimbursable Expenses ("Second Fee Order") entered on June 19, 2003, allowed \$96,046.26 in compensation and \$6,875.53 in expenses and authorized payment of \$ \$68,888.69 in compensation and \$3,850.30 in expenses to the Trustee's counsel. Thus, although the total fees and expenses requested were allowed, there remained \$27,157.57 in fees and \$3,025.23 in expenses that could not be paid because, at the time that the Second Fee Order was entered, these amounts could not be surcharged against the collateral under section 506(c).

Discussion

The Trustee's counsel explains that he has not received double payment for the same services. He explains that, because the First Fee Order did not authorize payment of \$18,942.58 in fees, he included those fees in his Second Fee Application.

The Trustee's counsel is correct that there was no double payment, but there has been a duplicate allowance of fees. The First Fee Order allowed the total fees and expenses requested, including the \$18,942.58 which could not be

surcharged against KOA's collateral. The Second Fee Order allowed all of the fees and expenses requested in the Second Fee Application, including the same \$18,942.58 that the First Fee Order allowed but which could not be paid then.

There is an important difference between the allowance of fees and expenses and the authorization of payment of fees and expenses. In many cases, the court allows and authorizes the payment of fees and expenses at the same time. Where there are insufficient funds to pay the allowed fees and expenses and all other accrued and anticipated administrative expenses, however, the court sometimes allows the requested fees and expenses but does not authorize direct payment. 11 U.S.C. §§ 330(a), 331. In this case, when the First Fee Order and Second Fee Order were entered, there were no unencumbered funds in the estate. Thus, the court allowed all of the requested fees and expenses but authorized the payment of a portion of the allowed fees and expenses pursuant to section 506(c) as a surcharge against the collateral. The payment of the remaining allowed fees was precluded until a later date when the estate's assets were no longer encumbered.

Subsequent to the issuance of the First Fee Order and Second Fee Order, the Trustee settled the claims of KOA. The remaining allowed, but unpaid, compensation and expense amounts awarded in the First Fee Order and Second Fee

Order can be paid immediately because there are sufficient unencumbered funds remaining in the estate to pay the compensation awarded.

The Second Fee Order will be amended appropriately to reduce the fees allowed by \$18,942.58, because these fees were previously allowed in the First Fee Order, and to authorize the payment of all allowed and unpaid fees and expenses, including the fees that were allowed but not paid pursuant to the First Fee Order.

DATED: Honolulu, Hawaii, May 6, 2004.



/s/ Robert J. Faris
United States Bankruptcy Judge